IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number 87-11177
LEASE PURCHASE CORPORATION	)	
	)	
Debtor	)	
	)	
JAMES D. WALKER, JR., TRUSTEE FOR LEASE PURCHASE CORPORATION, VELSTAR ENTERPRISES, INC., JOHN GINN ENTERPRISES, INC., MIG INVESTMENT CO., INC. RAY MORRIS HOUSING CENTER, INC. CHARLES FLANDERS HOMES, INC. BOB WRIGHT HOMES, INC. VELSTAR INSURANCE AGENCY, INC. HARRY LUCAS HOMES, INC., HUTCHINSON HOMES, INC., AND WREN HOMES OF AUGUSTA, INC.	)	FILED at 5 O'clock & 15 min P.M. Date: 5-21-92
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 90-1092
CIT FINANCIAL SERVICES CORPORATION AND CIT/GROUP SALES FINANCING, INC.	)	
	)	
Defendants	)	

ORDER

Before the court is plaintiff's motion for partial summary judgment. The facts relevant to plaintiff's motion are as follows. Lease Purchase Corporation ("Lease/Purchase") is the

parent corporation of a network of mobile home dealers (hereinafter "the

dealers") formerly in the business of selling new and used mobile homes. Plaintiffs allege that Lease/Purchase owns one-hundred percent of the stock of co-plaintiff Velstar Enterprises, Inc. ("Velstar"), which owns one-hundred percent of the stock of co plaintiff John Ginn Enterprises, Inc. ("John Ginn") and that John Ginn directly or indirectly owns one-hundred percent of all of the stock of each of the remaining mobile home dealers in the corporate chain.[1]

Defendants, CIT/Group Sales Financing, Inc. and CIT Financial Services Corporation[2] (collectively "CIT") purchased retail sale installment agreements ("installment agreements") executed by mobile home purchasers and individual dealers under the terms of a "dealer underlying agreement" ("dealer agreement") entered into by CIT and each dealer. One of two form dealer agreements, form No. 70-642R (2-80) or form No. 70-612Q (6-71),[3] was entered into between CIT and each dealer.

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[1]According to plaintiffs, the only exception is Art Dellano Homes, Inc., the stock of which John Ginn indirectly owns seventy-five percent.

[2]CIT Group/Sales Financing, Inc. is successor by merger to CIT Financial Services Corporation.

[3]These numbers appear in the bottom left-hand corner of each dealer agreement.

Under either form dealer agreement, CIT is entitled to retain a portion of the proceeds from each installment agreement purchased from a dealer. Withheld proceeds are posted to various reserve accounts ("dealer reserve

accounts") pursuant to certain terms and conditions more particularly described in the dealer agreement. Other than paragraph No. 5 of each dealer agreement, the two form dealer agreements are identical. Paragraph No. 5 of form No. 70-642R (2-80) specifically grants CIT a security interest in the dealer reserve account.[4] Paragraph No. 5 of form No. 70-612Q\ (6-71) contains no language that a "security interest" is granted or that the document is a "security agreement," nor is CIT referred to as

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[4]Paragraph No. 5 of form dealer agreement No. 70-642R (2-80) provides:

> We [the dealer] hereby grant you [CIT] a security interest in all holdback and amounts to our credit in our reserved payment account. If (i) we are in default to you hereunder, or under the terms of any specific contract purchased by you from us, or under any Agreement for Wholesale Financing, or under any other obligation to you pursuant to a written contract or otherwise; or (ii) for any reason you stop buying our contracts hereunder, then in either of such events, notwithstanding any other provision herein, you may retain all amounts to our credit in our reserved payment account and all holdbacks [the dealer reserve accounts] until all contracts purchased from us and all outstanding obligations to you, whether under this Agreement or otherwise, have been fully paid and, at your option without notice, you may charge any of our obligations against our said account and holdback. The holdback and reserved payments shall not bear interest.

a "secured" party or the dealer reserve accounts as "security" or "collateral."[5]

Pursuant to the dealer agreement, each dealer is entitled to receive amounts credited to its dealer reserve account when certain conditions are met. In December 1987 counsel representing the dealers made demand on CIT for turnover of dealer reserve account funds. On February 4, 1988 CIT filed with the Clerk of the Superior Court, Richmond County, Georgia a form UCC-1 financing statement against each dealer and attached thereto a copy of the original dealer agreement signed by the dealer's corporate officer.[6] As each dealer ceased doing business before CIT filed the financing statements, CIT could not obtain the signature of a corporate representative of each dealer on the financing statements. CIT's name and address are typed in the upper right-hand corner of each dealer agreement; the dealer's name and address are typed in the upper left-hand corner. The

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[5]Paragraph No. 5 of form dealer agreement No. 70-612Q (6-71) provides:

> If for any reason you stop buying our contracts hereunder or if we are in default to you hereunder or otherwise, then, notwithstanding any other provision herein, you may retain all amounts to our credit in our reserved payment account and all holdback until all contracts purchased from us and all of our outstanding obligations to you hereunder have been fully paid and, at your option without notice, you may charge any of our obligations against our said account and holdback.

[6]CIT's "Exhibit C" contains copies of the financing statements and dealer agreements filed on behalf of 36 dealers on February 4, 1988. As to Lease/Purchase, Velstar and Hutchinson Homes, Inc., the only entities in bankruptcy on February 4, 1988, infra, no financing statement or dealer agreement was filed.

typed names and addresses were not on the original dealer agreements, but were added by CIT prior to filing the documents in the Superior Court Clerk's Office.

On November 2, 1987 Lease/Purchase, Hutchinson Homes, Inc. ("Hutchinson Homes") and Velstar filed Chapter 11 bankruptcy petitions in this court. The Chapter 11 cases were subsequently converted to Chapter 7 and James D. Walker, Jr. was appointed as trustee. Between September 1989 and November 1989 each of the other co-plaintiffs filed a Chapter 7 bankruptcy petition.[7] CIT filed a proof of claim in the Lease/Purchase, Velstar and Hutchinson Homes Chapter 11 cases for Three Million Seven Hundred Twenty-Nine Thousand Seven Hundred Thirty-Three and No/100 ($3,729,733.00) Dollars for "[e]stimated losses due to defaults on purchased retail contracts [from all dealers] as of the date of bankruptcy [November 2, 1987]." CIT alleges in its proof of claim that total estimated installment

[7]The remaining mobile home dealers recently filed Chapter 7 petitions, but none were in bankruptcy on November 2, 1987. Although these dealers (those that are not plaintiffs) are now in bankruptcy, because they were not in bankruptcy when Lease/Purchase filed its Chapter 11 petition, they will be referred to hereinafter collectively as the "nondebtor dealers"; "dealers" will refer to all entities which compose the corporate chain, regardless of when a bankruptcy petition was filed.

contract losses are Five Million Seven Hundred Thirty Seven Thousand Five Hundred and No/100 ($5,737,500.00) Dollars and indicates a balance in all dealer reserve accounts of Two Million Seven Thousand Sixty-Seven and No/100 ($2,007,067.00) Dollars. In its proof of claim, CIT applies the balance in the dealer reserve accounts against estimated future installment contract losses to arrive at the proof of claim amount.

On February 28, 1990 the Chapter 7 trustee signed a document entitled "assignment" wherein the trustee as the purported equitable owner of all of the nondebtor dealers assigned each nondebtor dealer's interest in its dealer reserve account to Velstar for one dollar.[8]

The Chapter 7 trustee and co-plaintiffs brought this adversary proceeding seeking turnover of the dealer reserve accounts pursuant to 11 U.S.C. §§542 and 543. Plaintiffs allege dealer reserve monies were applied prior to the initial three Chapter 11 petitions to recover CIT's installment agreement losses and contend those transactions are avoidable as preferential transfers. In their complaint, plaintiffs demand an accounting by CIT of all funds held in the dealer reserve accounts and any prior

[8]The agreement also sets forth the terms of a contingency fee agreement pursuant to which counsel for the nondebtor dealers would prosecute an action against CIT to recover dealer reserve account funds.

chargebacks against the dealer reserve accounts. By motion for partial summary judgment, plaintiffs seek a determination that all dealer reserve accounts for all dealers became property of the bankruptcy estate of Lease/Purchase on November 2, 1987, the date Lease/Purchase filed its Chapter 11 petition. Alternatively, plaintiffs seek a determination 1) that CIT's "alteration" of the dealer agreements (the addition of its and the dealers' names and addresses) and its filing of unsigned financing statements with appended dealer agreements does not satisfy the requirements for perfection of a

security interest in Georgia[9]; and 2) that the form No. 70-612Q (671) dealer agreements are not "security agreements" under Georgia law. CIT opposes plaintiffs' motion.

MEMORANDUM OF LAW

Federal Rule of Civil Procedure ("FRCP") 56(a), made applicable to adversary proceedings by Bankruptcy Rule 7056, provides that "[a] party seeking to recover upon a claim . . . may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor

[9]There is no dispute that Georgia law governs the State law issues in this adversary proceeding.

upon all or any part thereof." The moving party bears the burden of proof that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). See generally Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986); Cowan v. J.C. Penny Company. Inc., 790 F.2d 1529 (11th Cir. 1986). Thus, "[t]o prevail on a motion for summary judgment, [the movant] must prove there is no dispute as to any material fact and based on the material facts, to which the parties are in agreement, [the movant] is entitled to judgment as a matter of law." Hail Co. v. Reynolds Tobacco Co. et al. (In re: Hail Co.), Chapter 11 case No. 88-40864 Adv. 90-4118 slip op. at p. 5 (Bankr. S.D. Ga. Dalis, J. Sept. 27, 1991). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent [to the summary judgment motion]." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted), cert. denied, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.E.2d 912 (1986). See also Adickes v. S.H. Kress Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142 (1970). As summary judgment is a drastic remedy, it should not be granted unless the movant establishes "that the other party is not entitled to recover under any discernible circumstances." Robert Johnson Grain Co. v. Chem. Interchange Co., 541 F.2d 207, 209 (8th Cir.

1976) (emphasis added). Accord In re: Marks, 40 B.R. 614 (Bankr. S.C. 1984).

In support of their contention that all dealer reserve accounts became property of Lease/Purchase's bankruptcy estate on November 2, 1987, the date of filing, plaintiffs argue that prepetition the parent corporation, Lease/Purchase, and all subsidiary entities that compose the network of mobile home dealers were de facto merged under Georgia law. Under Georgia law when a corporate merger occurs, "[u]pon the effective date of the merger, the surviving corporation becomes vested with all the assets of the disappearing corporations and becomes subject to their liabilities."
Comment, Official Code of Georgia Annotated (O.C.G.A.) §14-2-1101.

Plaintiffs do not attempt to show, however, that Lease/Purchase and the dealers were formally merged pursuant to Georgia's corporate merger statute, O.C.G.A. §14-2-1101. Plaintiffs contend, based on the particular circumstances relative to the ownership and operation of each dealer, that a de facto merger of all the dealers into Lease/Purchase took place prior to November 2, 1987. Specifically, plaintiffs argue that when Lease/Purchase acquired one-hundred percent ownership of Velstar's stock, it acquired all stock of all the subsidiary dealer corporations. Plaintiffs also allege that in 1987, all officers of the respective dealers had resigned except for one individual who conducted all business for all dealers out of one office.

Plaintiffs argue, based on these alleged facts, that the assets of each dealer, including each dealer's claim to dealer reserve account funds retained by CIT, became assets of Lease/Purchase as of the effective merger date, prior to November 2, 1987. Plaintiffs are incorrect.

Even assuming the facts plaintiffs allege are correct, a de facto merger of Lease/Purchase and the dealers has not occurred. "De facto" merger in Georgia refers to a sale by a corporate entity of its assets to another corporation with a continuation of the ownership interests of the selling corporation's stockholders in the buying corporation. Howard v. APAC-Georgia Inc., 383 S.E.2d 617, 618-19 (Ga. App. 1989). Four specific elements must be proven in connection with the sale of corporate assets to establish a de facto

merger under Georgia law:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations. (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation. (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon

> as legally and practically possible. (4) The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation.

Howard, supra, at 618-19 (Ga. App. 1989) [adopting the four-part test of Bud Antle, Inc. v. Eastern Foods. Inc., 758 F.2d 1451, 1458 (11th Cir. 1985)]. Although some of the facts alleged by plaintiff, if proven, may support a finding of de facto merger, plaintiff has not established nor alleged that Lease/Purchase bought the assets of the dealers. Plaintiff relies merely on Lease/Purchase's alleged indirect ownership of each dealer, defunct status of each dealer, and operation of each dealer out of one location in arguing de facto merger. These facts, if proven, do not constitute de facto merger under Georgia law. Moreover, as pointed out by the district judge in a companion case to this adversary proceeding, James D. Walker, Jr., Trustee for Lease Purchase Corp., et al. v. Citicorp Acceptance Co.,

Inc. In re: Citicorp Acceptance Co./Mobile Home Dealer Litigation), case No. 91-2104 4/A slip op. at 10-11 (W.D. Tenn. 1991), a corporate parent's ownership of a subsidiary's stock does not equate to ownership of the subsidiary's assets. Id. [citing In re: Beck, 479 F.2d 410, 415 (2nd Cir. 1973)]; accord In re: ! Pearl-Wick Corp., 26 B.R. 604, 607 (S.D. N.Y. 1982), aff'd, 697

F.2d 291 (2nd Cir. 1982); Matter of Reading Co., 59 B.R. 1011, 1013 (E.D. Pa. 1986). While the network of mobile home dealers operated essentially as one enterprise, each dealer was and is a separate corporate entity. In unusual circumstances, disregard of corporate distinctions may be justified. See. e.g., In re: Pittsburgh Railways, 155 F.2d 477 (3rd Cir. 1946), cert. denied, 329 U.S. 731, 67 S.Ct. 90, 91 L.E.2d 632 (1946) (public need); Matter of Reading Co., supra, at 1014 (fraudulent or wrongful use of corporate distinctions may justify ignoring them, although it did not in the case at bar). Plaintiffs do not establish that disregard of the separate corporate existence of each dealer entity is justified and have failed to show that, as a matter of law, the dealer reserve accounts became property of the bankruptcy estate of Lease/Purchase when it filed its Chapter 11 petition on November 2, 1987.[10]

Plaintiffs also argue that CIT is estopped from denying de facto merger because CIT's proofs of claim filed in the Lease/Purchase, Velstar and Hutchinson Homes bankruptcy cases allege installment contract losses against all, not just those

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[10]As to the alleged post petition acquisition of dealer reserve accounts by the estate of Lease/Purchase by virtue of the trustee's "assignment" of each dealer's interest in its dealer reserve accounts, see 11 U.S.C. 541(a)(7), I agree with the district judge in the companion case that to the extent the assignment agreement is otherwise valid and binding under Georgia law (an issue which has not been addressed by the parties), the trustee's purported assignment of property not owned by a debtor for whom he was authorized to serve as trustee under 11 U.S.C. 704(a) does not render the property property of Lease/Purchase's bankruptcy estate pursuant to 11 U.S.C. 541(a)(7). See Walker v. Citicorp Acceptance Co., supra, at 8.

debtor entities. Whatever the merit, if any, of plaintiffs' estoppel argument, under Georgia law there was no de facto merger of these corporate entities. CIT's proofs of claim do not render the dealer reserve accounts for each dealer property of the Lease/Purchase bankruptcy estate.

Having determined the dealer reserve accounts are not property of Lease/Purchase's bankruptcy estate, I address plaintiffs' "alternative" argument that CIT does not hold a perfected security interest in the dealer reserve accounts.[11] Plaintiffs argue that the form 70-612Q (6-71) dealer agreements are not security agreements under Georgia law, and therefore, CIT has no secured interest in the dealer reserve accounts maintained pursuant to those dealer agreements. The Georgia Commercial Code defines "security agreement" as "an agreement which creates or provides for

a security interest." O.C.G.A. §11-9-105(1)(l). A "security interest" is "an interest in personal property . . . which secures payment or performance of an obligation . . . . The term [Isecurity interest] also includes any interest of a buyer of . . . chattel paper which is subject to Article 9 of this title

[11]However, as explained in my prior order denying CIT's motion for summary judgment, CIT has a right to recoup installment contract losses from the dealer reserve accounts, which right exists without regard to whether CIT has a perfected security interest in the dealer reserve accounts.

[O.C.G.A. §11-9-101 et seq.]." O.C.G.A. §11-1-201(37). CIT, a buyer of chattel paper, holds a secured interest in the dealer reserve accounts if the dealer reserve accounts secure payment of the dealers' contingent debt obligations. See generally In re: Dillard Ford, 940 F.2d 1507, 1511 n. 5 (11th Cir. 1991) (applying Georgia law). Under Georgia law no magic words are required to create a security interest. Matter of Nat. Travelers, Inc., 110 B.R. 619, 621 (Bankr. M.D. Ga. 1990) (applying Georgia law); United States v. Hollie (In re: Hollie), 42 B.R. 111, 117 (Bankr. M.D. Ga. 1984) (same);lsee also Kubota Tractor v. Citizens & Southern Nat. Bank, 403 S.E.2d 218, 222 (Ga. App. 1991) (no particular words necessary to create a security interest in after-acquired property). Neither is a clause specifically granting a creditor a "security interest" necessary. In re: Hollie, supra, at 117. What determines whether the creditor is a secured party is whether the parties intended to create a security agreement. Matter of Nat. Travelers. Inc., supra, at 621; see also Barton v. Chemical Bank, 577 F.2d 1329 (5th Cir. 1978) (applying Georgia law). The form 70-612Q (6-71) dealer agreement provides in paragraph No. 5 (see note 5) that if CIT ceases buying

installment agreements from the dealer or if the dealer is in default under the terms of the dealer agreement, CIT may retain the dealer's reserve account funds until all installment

agreements purchased from the dealer and all of the dealer's obligations under the dealer agreement are satisfied, and that CIT may charge any such obligations against the dealer's reserve account. Although the form 70-612Q (6-71) dealer agreement does not expressly grant CIT a "security interest" in the dealer reserve account, refer to CIT as a "secured" party or to the dealer reserve account as "security" or "collateral," such language is not necessary to grant a security interest. All that is required is that the parties intend that the creditor retain an interest in property to secure payment of the debt obligation. As it appears from the evidence presented thus far that the parties intended in paragraph 5 that CIT's rights in the dealer reserve account, specifically its right to retain dealer reserve account funds and its right to charge the outstanding obligations of the dealer against the account, "secures payment or performance" of the dealer's contingent obligations under the dealer agreement, plaintiffs have failed to establish as a matter of law that CIT does not retain a security interest in the dealer reserve accounts in question.

A security interest attaches when three conditions are met: (1) the debtor must sign a security agreement containing a description of the collateral, O.C.G.A. §11-9-203(1)(a); (2) value must be given, O.C.G.A. §11-9-203(1)(b); and (3) the debtor must

have rights in the collateral, O.C.G.A. §11-9-203(1)(c). In re: Dillard Ford, supra, at 1511. Plaintiffs argue that the form 70-612Q (6-71) dealer agreements do no contain a description of the collateral that comports with O.C.G.A. §11-9-203(1)(a). Plaintiffs' argument is without merit. The purpose of the description requirement in O.C.G.A. §11-9-203(1)(a) is "to provide identification of the collateral so as to avoid disputes over its identity." Personal Thrift Plan of Perry v. Georgia Power, 242 Ga. 388, 249 S.E.2d 72, 74 (Ga. 1978). The form 70-612Q (6-71) dealer agreements, as well as the form 70-642R (2-80) dealer agreements,[12] thoroughly describe the various reserve accounts and the terms and conditions pursuant to which CIT is entitled to retain the funds, which description is sufficient under Georgia law for CIT's security interest to attach. See Dillard, supra, at 1511. As it appears from the evidence presented thus far that the dealer agreements were signed by a corporate representative of each dealer and contain a description of the property in which CIT has a security interest, value was given, and each dealer has a contingent right in the collateral, plaintiffs have failed to establish as a matter of law

[12]As stated above, other than paragraph No. 5, the two form dealer agreements are identical. The description of the dealer reserve accounts is therefore the same in each form. The text of the dealer agreements which describes the dealer reserve accounts is set forth in the order entered in this adversary proceeding denying CIT's motion for summary judgment (order dated Nov. 27, 1991) at pp.

that CIT does not hold a valid and enforceable security interest in the dealer reserve accounts.

Plaintiffs contest the sufficiency of the unsigned financing statements and the attached dealer agreements as a means of perfecting CIT's security interest in the dealer reserve accounts. Plaintiffs also argue that CIT's addition of its and each dealer's name and address to the dealer agreements was improper and insufficient to satisfy Georgia's perfection requirements. O.C.G.A. §11-9-402(1), which sets forth the perfection requirements in Georgia, provides in pertinent part that

> [a] financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, contains a statement indicating the types, or describing the items, of collateral. . . . A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor.

(Emphasis added).

O.C.G.A. §11-9-402(1) is clear. A security agreement is sufficient in lieu of a financing statement if it contains the required information. The evidence before me indicates that each dealer agreement filed by CIT contains the name of the dealer and the secured party, CIT; is signed by the dealer; gives an address of CIT from which further information concerning CIT's security interest may be obtained; gives the dealer's mailing address; and

sufficiently describes the collateral.

Plaintiffs' argument that because the dealer agreements were not signed contemporaneously with CIT's attempted perfection of its security interest, the signature requirement of O.C.G.A §11-9-402(1) has not been met is without merit. Plaintiffs rely primarily on Matter of Pischke, 11 B.R. 913 (Bankr. E.D. Va. 1981) (applying Virginia's version of the Uniform Commercial Code) where the court held that an unsigned form financing statement, an attached guaranty agreement containing the debtor's signature, and an attached statement of collateral did not comply with Virginia's filing requirements. Pischke is distinguishable from this case. In Pischke, the court concluded that the debtor "did not intend that a recordable security interest be created when he executed the guaranty," id. at 925, and that therefore "the . . . financing statement and guaranty should not be considered as one document." Id. Because there was not one document containing all of the information required to satisfy the perfection provisions of the Virginia Code the court determined that the creditor's security interest was unperfected. Id. Here, it appears from the record that all of the filing information required by O.C.G.A. §11-9-402(1) is contained in each dealer agreement and that the parties intended that CIT retain a security interest in the dealer reserve accounts. The fact that each dealer's corporate representative signed a dealer agreement rather than a form UCC-1,

and the timing of such

signature, does not matter. The purpose of a security agreement is to verify the debtor's assent to granting a security interest to the creditor. See Kubota Tractor, supra, at 222. The purpose of a financing statement is "to notify third parties . . . that there may be an enforceable security interest in the property of the debtor." Id. [quoting Villa v. Alvarado State Bank, 611 S.W.2d 483, 486 (CCA Tex. 1981)]. The filed dealer agreements contain all of the information required by O.C.G.A. §11-9-402(1) to adequately notice third parties of CIT's security interest in the dealer reserve accounts. Plaintiffs have failed to prove as a matter of law that CIT does not hold a properly perfected security interest in each of the dealer reserve accounts.[13]

Plaintiffs also argue that CIT's addition of its and each dealer's name and address, to the dealer agreements filed with the Richmond County Superior Court Clerk's Office voids the dealer agreements pursuant to O.C.G.A. §13-4-1, which provides,

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[13]Plaintiffs also cite Sommers v. International Business Machines, 640 F.2d 686 (5th Cir. Unit A. 1981) wherein the Fifth Circuit Court of Appeals held that a photocopy of a signed security agreement filed as a financing statement was insufficient to satisfy the perfection requirements of the Texas Commercial Code, specifically the requirement that the financing statement be signed by the debtor. The rationale of Sommers does not apply in this case because the original dealer agreements bearing the dealers' signatures, rather than photocopies, were filed in the superior court clerk's office.

> If a written contract is altered intentionally and in a material part thereof by a person claiming a benefit under it with intent to defraud the other party the alteration voids
>
> the whole contract, at the option of the other party. If the alteration is unintentional or by mistake or in an immaterial matter or not with intent to defraud and if the contract as originally executed can be discovered and is still capable of execution, it shall be enforced by the court. If the alteration is made by a stranger and not at the instance or by collusion of a party or privy and if the original words can be restored, the contract shall be enforced.

The "alteration" to each dealer agreement, the addition of CIT's and the dealer's names and addresses, is not a material alteration because the parties' contractual obligations were unaffected, see Dale v. Dawson County Bank, 145 S.E.2d. 619 (Ga. App. 1965), Franco v. Bank of Forest Park, 165 S.E.2d 593 (Ga. App. 1968), nor can plaintiffs establish as a matter of law an intent to defraud on the part of CIT, an issue which is necessarily factual. Plaintiffs have failed to prove that there are undisputed material facts which, as a matter of law, support a summary judgment determination in their favor on the issues raised by their motion.

It is therefore ORDERED that plaintiffs' motion for partial summary judgment is denied.

JOHN S. DALIS

UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 21st day of May, 1992.